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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1994

DOYLE V. TATUM,

PETITIONER

V.

BRENDA J. AUSTIN,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals properly analyzed the summary judgment evidence in the present case in a light most favorable to Petitioner, the non-movant in the summary judgment proceeding, and took as true all the evidence presented by the non-movant and drew all conclusions in the non-movant's favor in accordance with Federal Rule of Civil Procedure, 56 and the well settled precedent of this Honorable Court.

II. Whether the Court of Appeals "De Minimis" force analysis in the present case, a case claiming excessive force against an arrestee in the context of the Fourth Amendment, as opposed to a claim of excessive force by a prisoner under the Eighth Amendment was proper.

III. Whether the Court of Appeals properly reversed the District Court's denial of Austin's Motion for Summary Judgment on the basis of Qualified Immunity.

LIST OF PARTIES

PETITIONER: Doyle V. Tatum

RESPONDENT: Brenda J. Austin

TABLE OF CONTENTS

	Page
Questions Presented for Review.	i
List of Parties	ii
Table of Contents	iii
List of Authorities	iv-v
Reference to Other Opinions	vi
Statement of Jurisdiction	vii
Constitutional Provisions and Statutes Involved in the Case	viii-ix
Statement of the Case	1-6
Statement of the Case Continued and Argument for Allowance of Writ. . .	7-29
Conclusion	30-32
Prayer	32

LIST OF AUTHORITIES

Cases:	Page
Anderson v. Creighton, 483 U.S. 635, 1075 S.Ct. 3034, 97 L.Ed.2d 523 (1987)	8
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986).....	7, 9, 18, 30
Bauer v. Norris, 713 F.2d 408, (8th Cir. 1983).....	29
Feemster v. Dehntjer, 661 F.2d 87, (8th Cir. 1981).....	28
Fraire v. City of Arlington, 957 F.2d 1268, (5th Cir. 1993).....	7
Graham v. Conner, 490 U.S. 386, 108 S.Ct. 1865, 104 L.Ed 2d 386, (1989).....	12, 22, 28
Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).....	8, 10
Hudson v. McMillan, 503 U.S. _____, 112 S.Ct. 995, 117 L.Ed. 2d 156 (1993).....	6, 26-30
Johnson v. Morel, 876 F.2d 477, (5th Cir. 1989).....	10, 21
Kidd v. O'Neil, 774 F.2d 1252, (4th Cir. 1985).....	29

Kodak v. Image Technichal Services,
504 U.S. ____, 119 L.Ed.2d 265,
112 S.Ct. 2072 (1992)..... 7, 9

Mitchell vs. Forsyth, 472 U.S. 511
105 S.Ct. 2006, 86 L.Ed.2d 411
(1985)..... 5

Siegert v. Gilley,
_____ U.S. _____, 111 S.Ct. 1789, 1793,
114 L.Ed.2d 277 (1991)..... 8

United States v. Harrison,
671 F.2d 1159, (8th Cir. 1982) cert.
denied 459 U.S. 847, 103 S.Ct. 104,
74 L.Ed.2d 94 (1982)..... 29

REFERENCE TO OTHER OPINIONS

1. The United States Court of Appeals for the Fifth Circuit rendered an opinion in this case on February 1, 1995. (Same is attached hereto in the Appendix.

2. The United States District Court for the Eastern District of Texas, Marshall Division, rendered a denial of summary judgment in this case on September 22, 1993. (Same is attached hereto in the Appendix).

3. The United States Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Rehearing by Order dated March 3, 1995. (Same is attached hereto in the Appendix).

STATEMENT OF JURISDICTION

A. The opinion of the Court of Appeals for the Fifth Circuit was filed on February 1, 1995. A timely Motion for Rehearing was filed by Petitioner. The Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Rehearing by Order dated March 3, 1995. The Court of Appeals then entered judgment in the case on March 17, 1995.

B. This Honorable Court has jurisdiction in this matter in accordance with 28 U.S.C. §1254(i).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 56, Federal Rules of Civil Procedure

2. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. §1983.

3. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S.C. Constitution, Amendment 4.

4. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S.C. Constitution, Amendment 8.

STATEMENT OF THE CASE

On or about March 4, 1982, then City of Texarkana, Texas Animal Control Officer, Loyce Gates apparently issued a "courtesy warning notice" to Tatum. (R. 214, 488). One of the alleged offenses for which this warning was given was violation of the City of Texarkana ordinance requiring a city dog license be attached to the collar of his dog. (R. 488). Four months subsequent thereto, Officer Gates filed "appropriate paperwork", same being an arrest report, offense report, and a complaint in order to obtain an arrest warrant for Tatum for the alleged offense. (R. 220-225, 232, 237-241). During this four-month interval Gates never spoke to or saw Tatum. (R. 221). On September 10, 1982, Municipal Judge Audrey Polous issued a warrant for the arrest of Tatum for the offense of failing to comply with the City of Texarkana, Texas dog license ordinance. (R. 348).

At approximately 9:00 p.m. on the evening of May 1, 1990, some eight years later, Tatum was

sitting at home with his family, enjoying television when Texarkana police officer Dwayne Lorrance came to his door. (R. 497). Officer Lorrance advised Tatum of the outstanding warrant and the nature of the charge. (R. 497). Arrangements were made for Tatum to see the warrant officer in the next day or two to remedy the situation. (R. 497). After Lorrance left his home Tatum recalled he did not live in Texarkana, Texas on the dates discussed and called the police department to speak to Lorrance. (R. 457). Tatum was told Lorrance would call him back. (R. 457).

Subsequent to this call, Officer Austin was dispatched to Tatum's residence for a warrant service. (R. 47). Officer Mike Hairston heard the dispatch and proceeded to Tatum's residence to assist Austin. (R. 47).

Prior to arriving at Tatum's home, Austin was aware the warrant was eight years old and for the alleged offense of failing to obtain a dog license, a Class C misdemeanor. (R. 367). Hairston arrived before Austin, and upon arriving

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confirmed the warrant by radio and was then provided this same information. (R. 384). Hairston placed Tatum under arrest and Austin arrived and took command of the arrest. (R. 47).

Hairston then patted Tatum down. (R. 370, 381). Subsequent to this Austin began to place Tatum in handcuffs. (R. 372). Tatum indicated he did not think this to be necessary. (R. 372). Austin indicated she had procedures to follow. (R. 372). Tatum then informed Austin that he had undergone a prior neck surgery and fusion. (R. 393-394). Austin then handcuffed Tatum behind his back. (R.371-372, 383, 393-394). Austin asked Tatum if he was in pain to which he replied, "Not now, no." (R. 394).

Austin then led Tatum to her patrol car. (R. 394). Austin opened the rear door to the car and Tatum began to get in the vehicle. (R. 394). In the process of placing himself in the rear seat, Tatum felt his arms moving into the small of his back causing him severe pain. (R. 394-395). At this point, Tatum told Austin "this is

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not going to work". (R. 394-395). Yet, even after hearing this, and aware that Tatum had provided no resistance to the arrest and further aware that no force was necessary, Austin stated "we have procedures we have to go by" and placed her hand on the crown of Tatum's head as he was attempting to rise from the car, and forcefully shoved him into the rear seat of her patrol car against his will and resistance. (R. 395-396). This use of excessive force caused Tatum severe cervical injuries requiring surgery. (R. 406-410).

Doyle Tatum, Petitioner herein, brought suit against two Texarkana, Texas police officers and the City of Texarkana pursuant to 42 U.S.C. 1983 alleging violations of his constitutional rights. Specifically, Tatum has alleged that Officer's Brenda Austin and Mike Hairston exercised excessive force in arresting him and failed to provide him needed medical attention in violation of his Fourth Amendment right to be free from unreasonable seizures of his person. Tatum has

alleged the City violated his Fourth Amendment right to be free from arrest without probable cause. Tatum has dismissed Officer Mike Hairston from the case altogether.

The District Court maintained jurisdiction over Petitioner's cause of action pursuant to 28 U.S.C. §1331 and §1343.

Prior to trial, Officer Austin filed a motion for summary judgment urging the District Court to enter a judgment in her favor on the basis of, among other things, "qualified immunity". The District Court, finding that fact issues existed on these issues, including Austin's qualified immunity defense, denied her motion.

Officer Austin filed an interlocutory appeal of the District Court's denial of her summary judgment motion to the Fifth Circuit Court of Appeals. Mitchell v. Forsyth, 472 U.S. 511, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The Fifth Circuit reversed the District Court's decision and rendered judgment in favor of Officer Austin,

holding that the summary judgment evidence shows her entitlement to qualified immunity as a matter of law. It is from the Fifth Circuit's judgment that Tatum now applies to this Honorable Court for writ of certiorari. [The City's motion for summary judgment was denied by the District Court. However, the City did not appeal to the Fifth Circuit and therefore is not a party to this proceeding].

Because the Court of Appeals ventured away from this Court's well settled precedent and Federal Rule of Civil Procedure, 56 in analyzing the summary judgment evidence in this case and because the Court of Appeals erroneously expanded on this Court's limited holding in Hudson v. McMillan, to apply a "de minimis" force analysis in a Fourth Amendment context as opposed to an Eighth Amendment Context, this Honorable Court should grant Petitioner's Application for Writ of Certiorari.

STATEMENT OF THE CASE CONTINUED AND ARGUMENT FOR ALLOWANCE OF WRIT

This is a summary judgment case involving a police officer's claim to qualified immunity. As the non-movant, Tatum is entitled to have the summary judgment evidence reviewed by the Court of Appeals in a light most favorable to him. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1993). In fact, the summary judgment evidence presented by Tatum is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), Kodak v. Image Technical Services, 504 U.S. ___, 119 L.Ed.2d 265, 277, 112 S.Ct. 2072 (1992). Mindful of these well settled principles of analysis, it is necessary to turn to the substantive law of qualified immunity and the facts of this case.

SUBSTANTIVE LAW - QUALIFIED IMMUNITY

EXCESSIVE FORCE

Whether a defendant asserting qualified immunity may be personally liable turns on the

"objective reasonableness" of his actions in light of clearly established law. Anderson v. Creighton, 483 U.S. 635, 638, 97 L.Ed.2d 523, 1075 S.Ct. 3034 (1987). In determining whether a governmental official is entitled to qualified immunity, a court must first ascertain whether the plaintiff asserted the violation of a clearly established constitutional right. Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982); Seigert v. Gilley, 500 U.S. 226, 232, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991). If this determination is made in favor of the plaintiff, the Court's analysis must turn to the "objective reasonableness" of the official's conduct in light of the clearly established constitutional right alleged by the plaintiff. Anderson, 483 U.S. at 639.

The Court of Appeals properly held that Tatum asserted the violation of a clearly established constitutional right, and thus survived the first prong of the qualified immunity analysis. (Slip Op., p.7). However,

the Court of Appeals incorrectly held that there exists no genuine issue of any material fact regarding the "objective reasonableness" of Austin's conduct, holding that her conduct was objectively reasonable as a matter of law and therefore she is entitled to qualified immunity.

In reaching this conclusion, and reversing the holding of the District Court, the Court of Appeals failed to consider critical evidence in favor of Tatum's claim and further analyzed the summary judgment evidence in a light most favorable to the movant, Officer Austin, and all inferences made by the Court of Appeals, were drawn in her favor, rather than in favor of the non-movant, Tatum. Thus, the Court of Appeals analysis of the summary judgment evidence was contrary to dictates of this Honorable Court's well settled precedent. Anderson v. Liberty Lobby, Inc.; Kodak v. Image Technical Services, supra; Fed.R.Civ.Pro., rule 56.

There is no dispute that the objective reasonableness of Austin's conduct must be

measured with reference to the well established law of "excessive force" as it existed on May 1, 1990. Harlow, 457 U.S. at 818-19. In the Fifth Circuit, as of May 1, 1990, a law enforcement officer exercised excessive force against an arrestee, such as Tatum, if the arrestee;

1. suffered a significant injury, which;
2. resulted directly and only from a use of force that was clearly excessive to the need, and the excessiveness of which was;
3. objectively unreasonable.

Johnson v. Morel, 876 F.2d. 477, 479 (5th Cir.1989)

Due to the fact that this case presented itself to the Court of Appeals in summary judgment form, the real issue before the Court was whether there existed summary judgment evidence which presented a legitimate fact question as to whether or not a reasonable police officer, in Austin's shoes on the evening of May 1, 1990, should have known that her conduct:

1. was clearly excessive to the need;

2. was objectively unreasonable under the circumstances presenting themselves to her on May 1, 1990; and

3. could cause Tatum a significant injury.

If the summary judgment evidence presented a fact question on these issues, then the District Court's denial of Austin's motion for summary judgment should have been affirmed by the Court of Appeals and the qualified immunity issue presented to a jury.

THE SUMMARY JUDGMENT EVIDENCE

I. WOULD A REASONABLE OFFICER HAVE KNOWN ON MAY 1, 1990 THAT OFFICER AUSTIN'S USE OF FORCE WAS CLEARLY EXCESSIVE TO THE NEED?

II. WOULD A REASONABLE OFFICER HAVE KNOWN ON MAY 1, 1990 THAT OFFICER AUSTIN'S USE OF FORCE WAS NOT OBJECTIVELY REASONABLE?

In gauging the "objective reasonableness" of the force exercised by Austin, the Court must balance the amount of force exerted upon Tatum against the need for that force. This Honorable

Court has provided guidance as to the type of factors to consider in determining the necessity for an officer's use of force. This Court has stated:

> ". . . its (objective reasonableness test) proper application requires careful attention to the facts of each particular case, including the severity of the crime at issue, whether the suspect poses a threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight."

Graham v. Connor, 490 U.S. 386, 396, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989).

The summary judgment evidence in the present case reveals that prior to arriving at Tatum's home on the evening of May 1, 1990, Austin was aware that Tatum was charged with the Class C misdemeanor offense of failing to obtain a city dog license. (R. 367). Austin knew, prior to her

arrival, that the offense allegedly occurred in 1982, some eight years earlier. (R. 367). Austin freely admitted the alleged offense was extremely minor. (Austin's Appellate Brief to Fifth Circuit Court of Appeals, p.11).

Austin testified that Tatum never posed any threat to the officers, himself or anyone else during the arrest. (R. 386-87). Austin testified further that Tatum never resisted the arrest or attempted to flee. (R. 374-75,377,381,386-87; Austin's Appellate Brief to the Fifth Circuit Court of Appeals, p. 11). Officer Hairston described Tatum as mostly cooperative. (R. 381-82). It is difficult to imagine a more benign arrest situation. Review of these factors make it difficult to envision the need for the use of any force to accomplish the arrest in this case. But the most glaring evidence on this issue comes from the mouths of the arresting officers themselves. Both Officers Austin and Hairston admit that no force was necessary to effectuate the arrest of Tatum and to have exercised any

force in the situation that presented itself on May 1, 1990 would have violated the policies and procedures of the City of Texarkana, Texas. (R. 377, 389; Austin's Appellate Brief to the Fifth Circuit Court of Appeals, p.11). Clearly this summary judgment evidence presents genuine issues of fact as to whether a reasonable police officer in Austin's shoes would know the force exercised by Austin against Tatum in shoving his head downward into the police car, knowing Tatum had undergone a prior neck fusion, was necessary under the circumstances that existed on May 1, 1990.

Yet when one reviews the opinion of the Court of Appeals, there is absolutely no discussion of whether or not the force exercised by Austin against Tatum was necessary under the circumstances of this case. How can the Court of Appeals properly analyze the "objective reasonableness" of Austin's conduct, in light of clearly established constitutional law, if the Court never reviews whether a reasonable office

in Austin's shoes on May 1, 1990 would believe the use of such force was necessary? Although the Court of Appeals indicates that Graham guides its inquiry into the objective reasonableness of Austin's conduct, (Slip Op. pp. 8-9), the Court never discusses or focuses on the very factors Graham, points to for review. The Court of Appeals clearly erred in this regard.

Furthermore, rather than draw inferences from the summary judgment evidence in favor of Tatum, the non-movant, the Court of Appeals drew inferences in favor of Austin.

The summary judgment evidence presented by Tatum, which the Court of Appeals was bound to believe was that prior to being handcuffed by Austin, Tatum was concerned enough about having handcuffs placed on him that he indicated to Austin that he had a prior neck surgery for a fusion. (R.393). After obtaining this knowledge, Austin was concerned enough about Tatum's potential neck problems that she inquired if the handcuffing of his hands behind his back caused

him pain. (R. 394). Thereafter, Tatum attempted to place himself in the rear seat of Austin's patrol car, voluntarily, but stopped halfway because he began having pain. (R. 394). Tatum then told Austin "This is not going to work" and began to stand up from the rear seat of the police car. (R. 394). It is at this critical point of the arrest the Court must focus.

Having just expressed concern about his prior neck surgery it could be reasonably inferred by a jury that a reasonable officer at the scene, possessing Austin's knowledge of Tatum's prior neck fusion, would realize Tatum was having physical difficulty with his neck. It could certainly be reasonably inferred from the evidence presented that a reasonable officer, being fully aware that Tatum had a prior neck fusion and was having difficulty placing himself in the patrol car, would realize that to place her hand and exert downward force to the crown of Tatum's head could cause a "significant injury".

Yet, rather than draw reasonable inferences from the summary judgment evidence in favor of Tatum, the Court of Appeals reviews this evidence as follows:

The force alleged to be excessive by Tatum is a "shove" on Tatum's head. Although Austin knew that Tatum had undergone neck or back surgery, Tatum had not yet complained of any pain. Instead, Tatum indicated that he was flexible enough to place his hands in handcuffs behind his back. His only statement to Austin prior to the shove was, "This is not going to work." This statement did not unequivocally suggest that Tatum was experiencing medical difficulties. Indeed, it would be reasonable for an officer in Austin's shoes to interpret this statement as indicating that Tatum, who was handcuffed, was having difficulty entering the patrol car without assistance. Even assuming that Tatum's statement conveyed pain, it did not indicate what part of Tatum's body was in pain, much less indicate that a shove to the head would

foreseeably result in surgery to remove bone spurs in the neck nineteen months later. (emphasis added).

The Court of Appeals clearly has drawn a critical inference in favor of the movant, contrary to the decisions of this Court. Anderson v. Liberty Lobby, Inc., supra.

The summary judgment evidence presents genuine issues of material fact as to whether or not a reasonable officer would have found the force exercised by Austin necessary under the circumstances that presented themselves to the officer on May 1, 1990, and whether such exercise of force was objectively reasonable.

III. WOULD A REASONABLE OFFICER IN AUSTIN'S SHOES ON MAY 1, 1990 HAVE KNOWN THE EXERCISE OF A DOWNWARD SHOVE ON THE CROWN OF TATUM'S HEAD WHILE HE WAS ATTEMPTING TO EXIT THE PATROL CAR HAVE CAUSED A "SIGNIFICANT INJURY"?

The summary judgment evidence relative to this inquiry has already been discussed above. The important summary judgment evidence on this

issue is that Tatum, prior to handcuffing, was so concerned about his potential neck problems from being arrested that he made Austin aware of his prior neck fusion. (R. 393). Assumably expressing her concern for this potential problem she asks if he can place his hands behind his back for handcuffing. (R. 394). Once she handcuffs Tatum she then asks if he is any pain. (R. 394). The evidence is clear that there was a real sense of concern for the safety of Tatum's neck and prior neck injury. It is undisputed that Austin possessed all of this knowledge prior to shoving the crown of Tatum's head downward and forcing him back into the police car. Surely this summary judgment evidence presents a fact question for a jury to determine as to whether a reasonable police officer in Austin's shoes would have known, to exert the kind of force she did (enough to force Tatum back down into the seat of the car) on the crown of Tatum's head, downward, would have caused him a significant injury.

The Court of Appeals would require Tatum t present evidence, not only showing a fac question on the issue of significant injury, bu erroneously requires Tatum to present evidenc that a reasonable officer in Austin's shoes woul know to exert such force would cause a specifi type of injury. As stated above the Court o Appeals states:

Even assuming that Tatum's statement ("Thi is not going to work") conveyed pain, it did no indicate what part of Tatum's body was in pain much less indicate that a shove to the head woul foreseeably result in surgery to remove bon spurs from the neck nineteen months later (emphasis added). (Slip Op., p.10).

The Court of Appeals, continuing to vie evidence in a light most favorable to the movan in this case discusses evidence which is no remotely relevant to the issue of whether reasonable officer in Austin's shoes would hav foreseen a significant injury by her use o force. The Court of Appeals discusses Tatum

reaction to the force after it was exerted. The Court states:

In addition, we think that the seriousness of the injury which resulted from the shove was insignificant when viewed from the perspective of a reasonable officer at the time of the arrest. After the shove, Tatum did not manifest any immediate physical pain. He did not scream in agony. He did not even say "ouch". Indeed, according to Tatum's deposition testimony, he did not com plain of any pain at all until Austin had driven approximately one mile. (emphasis added). Thus, under the circumstances of this case, a reasonable officer would not foresee that Austin's action would cause a "significant injury" within the meaning of Johnson. (Slip Op., p. 10).

The Court of Appeals never explains how Tatum's reaction to the use of force after the fact, could possibly enter into what a reasonable police officer would think the results of her use of force would be prior to exercising such force.

Furthermore, the Court of Appeals does not explain how the fact that Tatum did not say "ouch", or complain of pain until about one mile down the road bears on whether he did or did not suffer a significant injury in this case as a result of Austin's exercise of unnecessary force in this case.

Furthermore, the summary judgment evidence reveals that as a result of the force exercised by Austin against Tatum, he sustained a significant and disabling injury involving the irritation and pinching of nerves in his cervical spine, eventually requiring surgical intervention to treat. (R. 406-410).

The Court of Appeals correctly recognizes that in the context of Fourth Amendment excessive force analysis it is necessary to balance the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 104 L.Ed.2d at 455. (Slip Op., p.9).

The deprivation of a person's liberty by making an arrest is, without question, a significant intrusion upon that person's Fourth Amendment interests. However, the exercise of any force against an arrestee in making an arrest compounds this intrusion immensely and should not be tolerated without the existence of important countervailing governmental interests.

All will agree that placing an arrestee in handcuffs is an exercise of force. Yet, even in the most docile of situations this exercise of force will likely not reach the summit of a constitutional violation. This is because the countervailing governmental interests in maintaining the safety and protection of law enforcement officers from harm and injury (including death) outweighs the Fourth Amendment intrusion of handcuffing.

However, the facts of this case present a much greater Fourth Amendment intrusion than handcuffing alone. Austin's intrusion upon Patum's Fourth Amendment interests have been

detailed above. The real issue becomes whether the countervailing governmental interests at stake in this case outweigh this intrusion.

The Court of Appeals identified the governmental interests at stake in this case as "the safe and speedy placement of Tatum under arrest." (Slip Op., p.11). The Court of Appeals states, "To achieve a safe and speedy arrest, the use of handcuffs, without more, is reasonable. In addition we have no difficulty in concluding that a necessary corollary to achieving a safe and speedy arrest is transporting the arrestee to the police station. The obvious method of transportation in this case was to place Tatum in Austin's patrol car." Petitioner agrees with this assessment of the governmental interest at issue in this case.

However, the summary judgment evidence in the case presents a situation which is completely docile. Officer Austin had a cooperative, non-resistant arrestee in Tatum. Tatum was being arrested on an eight year old Class C misdemean-

arrant regarding failure to obtain a city dog license. In fact, Tatum was attempting to place himself in the car voluntarily. (R. 394). Unlike the Court of Appeals' statement that perhaps Tatum was "unwilling" to enter the patrol car. [Slip Op., p.11]). Yet, this being the case the Court of Appeals finds that a reasonable officer under these circumstances could have concluded that placing an officer's hand on the crown of Tatum's head and forcing him downward in the police car and saying "we have procedures to follow" was objectively reasonable, in spite of the officer's knowledge of the arrestee's prior neck fusion. (Slip Op., p., 11). The Court of Appeals never attempts to explain why a reasonable officer under these circumstances would not have simply allowed Tatum to exit the car and inquire as to what problem existed for him in entering the car and then attempt to try an alternative method. Certainly had Tatum been resistant to the arrest and abusive to the officers this alternative may not have been

reasonable, but this was not the case. The Court of Appeals never indicates why this potential solution of the problem at hand would not have been sufficient to accommodate the government interests identified by the Court of Appeals. The Court of Appeals simply states that the nature and quality of the force used against Tatum was insignificant and "de minimis", and thus does not reach the level of constitutional protection. (Slip Op., p. 9, 11)

The Court of Appeals' conclusion that the use of this so called "de minimis" force does not reach the level of constitutional protection is incorrect in the context of the Fourth Amendment analysis. This Honorable Court has discussed "de minimis" force in the context of prisoner claims of constitutional violations. In Hudson v. McMillan, 503 U.S. ____, 117 L.Ed.2d 156, 112 S.Ct. 995 (1993), this Court stated:

> "The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from

constitutional recognition de minimis uses of physical force, provided that the use of force is not of a kind repugnant to the conscience of mankind." Hudson, 117 L.Ed.2d at 167-68.

The failure of the Court of Appeals on this issue is that it fails to differentiate between prisoners and arrestees. Neither does the Court distinguish the different constitutional protections afforded each. It can hardly be questioned that the constitutional protections afforded an arrestee under the Fourth Amendment far exceed those of a prisoner whose right to be free from excessive force falls under the confines of the Eighth Amendment's protections against cruel and unusual punishment. Hudson, supra. No decision of this Honorable Court has held an arrestee's right to be free from unreasonable seizures of one's person, excludes the use of de minimis force from constitutional protection. In fact, Hudson specifically limited

the "de minimis" force analysis to Eight Amendment review.

The Hudson "repugnant to the conscience o mankind" analysis conforms with the "cruel an unusual punishment" language of the Eigh Amendment, but bears no relation to th reasonableness analysis of the Fourth Amendment Graham, 104 L.Ed.2d at 454-55. As the presen case illustrates, there will be cases involvi arrestees, where there exists the need to use f force to accomplish the goal of the government o a safe and speedy arrest of a suspect. In thes situations it will be unnecessary an unreasonable to exercise, even "de minimi force. In these situations the use of any for by the arresting officer will be potentiall objectively unreasonable given the circumstanc of the arrest. It is no new concept that the u of any force when a reasonable police offic would know none is necessary under th circumstances is indeed a constitution violation. Feemster v. Dehntjer, 661 F.2d 87,

(8th Cir. 1981); United States v. Harrison, 671 F.2d 1159, 1162 (8th Cir. 1982) cert. denied 459 U.S. 847, 103 S.Ct.104, 74 L.Ed.2d 94 (1982); Kidd v. O'Neil, 774 F.2d 1252, 1256-57 (4th Cir.1985); Bauer v. Norris, 713 F.2d 408, 412 (8th Cir. 1983).

"De Minimis" force exercised against an arrestee may be objectively unreasonable as analyzed under the Fourth Amendment. However, such force will rarely amount to punishment under a "cruel and unusual punishment" analysis under the Eighth Amendment. Thus, the "de minimis" force analysis logically applies to excessive force claims of prisoners as has been held by this Court Hudson, supra., but has no place in excessive force claims by arrestees governed by the Fourth Amendment. Thus, the Court of Appeals erred in applying a "de minimis" force analysis to the facts of the present case and reversing the decision of the District Court, in part, on this basis.

CONCLUSION

Because the Court of Appeals reviewed the summary judgment evidence in this case in a manner inconsistent with the well settled precedents of this Honorable Court and because the Court of Appeals improperly applied a "de minimis" force analysis to a Fourth Amendment case when this Court in Hudson, limited such analysis to an Eighth Amendment context, this Honorable Court should grant Petitioner's Writ.

The Court of Appeals reviewed the summary judgment evidence in this case in a light most favorable to the movant, Officer Austin, and drew all inferences from the evidence in her favor in direct conflict with the legal precedents set by this Honorable Court. Anderson v. Liberty Lobby, Inc., supra. In doing so, the Court of Appeals ignored critical summary judgment evidence favorable to Tatum, the non-movant. The summary judgment evidence presented in this case clearly reveals that genuine issues of material fact exist for jury determination on the issues of:

1. Whether or not a reasonable officer would think the exercise of force used against Tatum by Austin under the circumstances of this case was necessary;

2. Whether or not a reasonable officer would think the exercise of force used against Tatum by Austin would likely cause a significant injury to Tatum, given the fact that Austin was aware that Tatum had undergone a prior neck fusion and expressed concern about that fact; and

3. Under the circumstances of this case, whether a reasonable officer in Austin's shoes under the circumstances of this case would believe her actions were objectively reasonable.

Given that fact issues exist with regard to these elements, it was error for the Court of Appeals to reverse the District Court's denial of Austin's motion for summary judgment. This Petitioner's Petition for Writ of Certiorari should be granted.

Furthermore, it was clearly error for the Court of Appeals to utilize a "de minimis" force

analysis in this Fourth Amendment context, a base its reversal of the District Court on th assessment. Therefore, this Honorable Cou should grant Petitioner's Writ of Certiorari a upon hearing thereof, reverse, in all things t judgment of the Court of Appeals and remand.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitione Doyle V. Tatum, respectfully prays that th Honorable Court grant his Petition For Writ Certiorari, and upon hearing thereof, reverse t judgment of the Court of Appeals in this case, total, and remand this case to the District Co for trial on the merits, and/or, in t alternative, reverse the judgment of the Court Appeals, in total, and remand this case back the Court of Appeals for further considerati with appropriate instructions from this Honorab Court, and for such other and further relief which this Petitioner may show himself just entitled.

RESPECTFULLY SUBMITTED,

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EDITOR'S NOTE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5370

DOYLE V. TATUM,

Plaintiff-Appellee,

v.

CITY OF TEXARKANA, ET AL.,

Defendants,

M. HAIRSTON and B.J. AUSTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-48)

Before WISDOM, KING, and DUHE, Circuit Judges.

PER CURIAM:

Doyle Tatum sued two Texarkana, Texas police officers and their municipal employer under 42 U.S.C. § 1983 alleging, inter alia, that the

officers used excessive force and denied him medical attention in the course of arrest. One of the officers, Brenda Austin, appeals from the district court's denial of her motion for summary judgment on grounds of qualified immunity. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 1982, Loyce Gates, an animal control officer of the City of Texarkana, Texas, issued a "Courtesy Warning Notice" to Tatum for failing to obtain a license for his dog and for violating that city's leash law. Tatum signed the warning notice to acknowledge its receipt. Over the next five months, Gates attempted to contact Tatum by phone and left numerous notices on Tatum's door reminding Tatum that he had to comply with the law. In August, 1982, after checking city records and finding that Tatum still had not obtained a license for his dog, Gates filed an offense report against Tatum. Gates also filed a sworn criminal complaint charging Tatum with failing to obtain a dog

license. A municipal court judge then issued a warrant for Tatum's arrest.

Eight years passed. On May 1, 1990, Texarkana police officer Dwayne Lorance was assigned to warrant duty and went to Tatum's residence to advise him of the existence of the outstanding warrant and to arrange for its resolution. Tatum agreed to visit the warrant officer at the police station two days later, and Lorance left Tatum's residence without incident.

After contemplating the situation for a few minutes, Tatum called the police department and asked to speak to the officer who had been serving warrants, to see if he could "get that thing ironed out that night" because Tatum believed the he neither lived in Texarkana now owned a dog in 1982. As Lorance was no longer on duty, the Texarkana police dispatched officer Brenda Austin and Mike Hairston to Tatum's residence to try to resolve the matter.

Officer Hairston arrived at the Tatum residence first. Hairston radioed back tot he

police department and confirmed the existence of the warrant. Tatum informed Hairston that another officer, Lorance, had come by earlier and agreed to let Tatum come by the station in two days. Officer Austin, who had also confirmed the existence of the warrant, arrived at Tatum's residence and was also informed of Officer Lorance's earlier visit.

What occurred next is unclear. Tatum alleges that, despite their knowledge of Tatum's earlier agreement with Lorance, Austin and Hairston decided to arrest him, although he admitted in his deposition that he never asked the officers to delay the arrest. Officer Austin asserted in her deposition that she offered to let Tatum come tot he police station the next day; however, Austin contends that Tatum insisted upon settling the matter that night. Austin informed Tatum that the matter could be settled immediately only by arresting Tatum.

Austin informed Johnson that he was under arrest. Tatum then told the officers that he had

recently undergone back or neck surgery. Austin responded by asking Tatum if he would have any problem placing his hands behind his back to accommodate handcuffs. Tatum replied that he would not have difficulty, and demonstrated his mobility by holding his arms out to the side and waving them behind his back. Austin placed the handcuffs on Tatum and asked Tatum if he was in any pain. Tatum replied that he was not. Austin led Tatum to her patrol care without exerting any force. As Tatum began to get into the patrol car, he stopped halfway and informed Austin that "this is not going to work."

Tatum contends that Austin then placed her hand atop Tatum's head and "shoved" his head downward and into the patrol car. Austin denies touching Tatum's head or making any other physical contact with Tatum. Austin buckled Tatum's seat belt around him, closed the door, and proceeded to drive to the police station. En route, Tatum asserts that he told Austin that he was in "tremendous pain' and asked Austin to

release his left arm from the handcuffs to alleviate the pain. Tatum asserts that Austin did not respond. He also assets that he complained of pain two additional times before arriving at the police station, but received no response from Austin other than noticing that she sped up after his third complaint. Austin claims that Tatum only complained of pain once. Tatum concedes that he never asked Austin for medical attention.

Once at the police station, Austin unfastened Tatum's handcuffs and booked him. Tatum did not complain of pain after arriving at the police station. Tatum was released that night after posting bail. Upon his release, Tatum went to the emergency room of a local hospital complaining of pain in his neck, back, and left arm. The emergency room physician examined and released Tatum. The following day, Tatum visited a neurosurgeon who had previously performed surgery on his back. The physician prescribed some painkillers and asked Tatum to

return if the pain continued. Tatum visited the neurosurgeon numerous times over the next year and a half, complaining of continuing pain in his neck, back, and left arm. Finally, approximately nineteen months after the arrest, Tatum underwent surgery on his neck to remove bone spurs. Tatum instituted suit against Hairston, Austin, and the City of Texarkana, alleging violation of his federal constitutional rights to be free from unlawful arrest and excessive force and to obtain reasonable medical attention while in police custody. Hairston and Austin moved for summary judgment from all claims based upon the defense of qualified immunity. The district court granted the motion as to the unlawful arrest claim, but denied their motion as to the excessive force and medical attention claims. Austin now appeals the district court's denial of her motion for summary judgment[1],

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[1] An order denying a motion for summary judgment based upon a claim of qualified immunity in a § 1983 action, to the extent that it turns upon an issue of law, is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 5320 (1985).

asserting that she is entitled to qualified immunity for her actions.[2] We agree and reverse.

II. STANDARD OF REVIEW

This court reviews the denial of summary judgment ont he basis of qualified immunity de novo, examining the evidence in the light most favorable to the nonmoving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992); Fed. R. Civ. P. 56(c).

To determine whether a governmental official is entitled to qualified immunity, a court must

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[2] Tatum has advised the defendants that he intends to dismiss his remaining claims against Hairston. Thus, Hairston is not a party tot his appeal. We also note that the district court denied the City of Texarkana's motion for summary judgment on the unlawful arrest claim; however, the city is not a party to this appeal.

first ascertain whether the plaintiff has asserted the violation of a clearly established constitutional right. Siegart v. Gilley, 500 U.S. 226, 232 (1991); Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cirt. 1993). Second, the Court must determine whether a reasonable official in the defendant's shoes would have understood that his conduct violated the plaintiff's constitutional rights. Anderson v. Creighton. 483 U.S. 635, 640 (1987); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). Thus, even if the official's conduct violates a constitutional right, she is entitled to qualified immunity if her conduct was objectively reasonable. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993); Salas, 980 F.2d at 305-06; Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). The

reasonableness of the defendant's actions is assessed in light of the legal rules clearly established at the time of the incident. Johnson v. City of Houston, 14 F.3d 1056, 1060 (5th Cir. 1994); Spann, 987 F.2d at 1114.

III. ANALYSIS

A. *Excessive Force Claim.*

Tatum had made the requisite threshold allegation of the violation of a constitutional right to be free from excessive force. The Fourth Amendment right to freedom from unreasonable seizures protects arrestees from the use of excessive force by the arresting officer.[3]

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[3] Austin argues that our recent decision in Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir.), cert. denied, 63 U.S.L.W. 3437 (1994), requires us to use a Fourteenth Amendment due process analysis rather than a Fourth Amendment "Reasonableness" analysis. We disagree. Brothers used a due process analysis in the context of analyzing a claim filed by a pretrial detainee, who was subjected to excessive force after the incidents of arrest had been completed. Id. at 457. The Brothers use of the Fourteenth Amendment was premised upon our earlier decision in Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.), cert. denied, 113 S. Ct.2998 (1993), which held that the use of a Fourth Amendment analysis is inappropriate when the alleged excessive force occurs "after the incidents of arrest are

Graham v. Connor, 490 U.S. 386, 388 (1989); King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). Thus, our inquiry focuses on whether a reasonable officer standing in the shoes of Austin would have known that her actions violated Tatum's constitutional rights.

Tatum was arrested on May 1, 1990. Our reasonableness analysis must therefore begin with a determination of the clearly established law as it existed on May 1, 1990. Spann, 987 F.2d at 1114. In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that, in assessing an excessive force claim, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against

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completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention for a significant period of time." Id. at 1444. In this case, the alleged excessive force took place before Tatum's arrest had been completed, before Tatum had been released from Austin's custody, and before Tatum had been in detention for a significant period of time. Hence, the Fourth Amendment, rather than the Fourteenth Amendment, provides the appropriate framework for analyzing Tatum's excessive force claim.

the countervailing governmental interests at stake." Graham, 490 U.S. at 396. In so balancing, we are to pay "careful attention to the facts and circumstances of each particular case. . ." Id. Furthermore, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.

In addition to Graham, at the time of Tatum's arrest, this court had decided Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (per curiam) (en banc), which required § 1983 plaintiffs alleging excessive force to show "significant injury" to succeed in a constitutional excessive force claim.[4] Therefore, in determining the

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[4] The "significant injury" requirement has since been abrogated by the Supreme Court's decision in Hudson v. McMillan, 112 S. Ct. 995 (1992). See Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994) ("We now hold that the Johnson [significant injury] standard is no longer valid in the wake of Hudson v. McMillan to assess whether plaintiff has alleged a constitutional violation.") (citation omitted).

objective reasonableness of Austin's use of force in 1990, the court should apply the significant injury test of Johnson since that was the constitutional benchmark when the events occurred. Harper v. Harris County, Tex., 21 F.3d 597, 601 (5th Cir. 1994); Rankin v. Klevenhagen, 5 F.3d 103, 108-09 (5th Cir. 1993). Thus, the seriousness of Tatum's injuries is relevant to our inquiry as to whether Austin's conduct was objectively reasonable. Harper, 21 F.3d at 601. However, as Graham makes clear, in assessing the various factors that comprise the reasonableness inquiry, we are to view the situation from the perspective of the officer at the scene, without the aid of 20/20 hindsight. Thus, in assessing the seriousness of Tatum's injury, we must disregard subsequent manifestations of illness which were not reasonably foreseeable at the time Tatum was arrested.

Thus, under Graham, our first task is to assess the "nature and quality of the intrusion of the individual's Fourth Amendment interests."

Id. Taking the facts in the light most favorable to Tatum, we think that the "nature and quality" of the force employed by Austin was de minimis. The force alleged to be excessive by Tatum is a "shove" on Tatum's head. Although Austin knew that Tatum had undergone neck or back surgery, Tatum had not yet complained of any pain. Instead, Tatum indicated that he was flexible enough to place his hands in handcuffs behind his back. His only statement to Austin prior to the shove was, "This is not going to work." This statement did not unequivocally suggest that Tatum was experiencing medical difficulties. Indeed, it would be reasonable for an officer in Austin's shoes to interpret this statement as indicating that Tatum, who was handcuffed, was having difficulty entering the patrol car without assistance. Even assuming that Tatum's statement conveyed pain, it did not indicate what part of Tatum's body was in pain, much less indicate that a shove to the head would foreseeably result in

surgery to remove bone spurs in the neck nineteen months later.

In addition, we think that the seriousness of the injury which resulted from the shove was insignificant when viewed from the perspective of a reasonable officer at the time of the arrest. After the shove, Tatum did not manifest any immediate physical pain. He did not scream in agony. He did not even say "ouch." Indeed, according to Tatum's deposition testimony, he did not complain of any pain at all until Austin had driven approximately one mile. Thus, under the circumstances of this case, a reasonable officer would not foresee that Austin's action would cause a "significant injury" within the meaning of Johnson.[5]

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[5] This case is distinguishable from those situations in which an officer hits a peaceful arrestee on the head with a nightstick or points a gun at nondangerous suspect. Cf. Johnson v. Morel, 876 F.2d 477, 481 (5th Cir. 1989) (Ruin, J., concurring) (arguing that the "severe injury" requirement is inappropriate because it would classify such actions as constitutionally permissible). Under such situations, a reasonable officer on the scene would foresee that his actions could cause significant physical

Having assess the nature and quality of Austin's actions, we must next balance it against the countervailing governmental interests at stake. Graham, 490 U.S. at 396. As the Supreme Court noted in Graham, "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. In this case, the governmental interest at stake was the safe and speedy placement of Tatum under arrest. To achieve a safe and speedy arrest, the use of handcuffs, without more, is reasonable. In addition, we have no difficulty in concluding that a necessary corollary to achieving a safe and speedy arrest is transporting the arrestee to the police station. The obvious method of transportation in this case was to place Tatum in Austin's patrol car. As Tatum appeared to be unable or unwilling to enter the patrol car without assistance, a

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or psychological injury.

reasonable officer in Austin's position could have concluded that touching Tatum's head in order to place him into the patrol car was not a constitutional violation.

In short, the nature and quality of the force used against Tatum was insignificant. The governmental interest in using the force-- to achieve a safe and speedy arrest-- was significant. Under the circumstances, we think that reasonable officers could differ ont he lawfulness of Austin's actions; therefore, Austin is entitled to qualified immunity. Harper, 21 F.3d at 600; Fraire, 957 F.2d at 1273; Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990).

B. Medical Attention Claims.

Tatum also alleges that Austin violated the constitution by failing to obtain needed medical attention for Tatum. In Esttelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court interpreted the Eighth Amendment's prohibition against cruel and unusual punishment as prohibiting prison

officials from acting with deliberate indifference to the serious medical needs of convicted inmates. By contrast, under the Fourteenth Amendment's Due Process Clause, pretrial detainees may not be subjected to conditions or restrictions which amount to "punishment." Bell v. Wolfish, 441 U.S. 520, 536-37 (1979). We have interpreted the Bell v. Wolfish standard to entitle pretrial detainees to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). Tatum contends that because he was an arrestee, Graham mandates that we use the Fourth Amendment's "reasonableness" standard applies.

The district court in this case applied the stricter "deliberate indifference" standard of the Eighth Amendment in denying Austin's motion for summary judgment on the medical attention claim. We need not decide at this time whether the Fourth, Fourteenth, or Eighth Amendment

provides the appropriate standard in such cases[6] because under each such standard, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. See Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1988) (noting that if a defendant acts with "deliberate indifference" to a convicted inmate's medical needs, that same conduct would violate the "reasonable medical care" standard).

Viewed in the light most favorable to Tatum, the evidence indicates that Tatum told Austin three times that he was in pain. He asked Austin to remove the left handcuff so that his left arm would not hurt. On the other hand, Tatum never requested medical attention. Moreover, Tatum's injuries did not require immediate medical attention, and he has not alleged that the two to three hour delay in obtaining medical attention

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[6] The standard under which we evaluate inadequate medical attention claims filed by pretrial detainees is the subject of our recent decision in Hare v. City of Corinth, 36 F.3d 412 (5th Cir. 1994), reh'g granted en banc, December 8, 1994 (pending), as to which rehearing en banc has been granted.

caused any complications. Finally, when Tatum went to the emergency room following his release, the doctor who examined him released him without treatment.

Given that Tatum never requested medical attention, that his injuries were not the kind which required immediate medical attention, and his detention was of short duration, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. Accordingly, Austin is entitled to qualified immunity for her actions.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DOYLE V. TATUM	)	
	)	
V.	)	NO. 5:92-CV-48
	)	
THE CITY OF TEXARKANA, TEXAS, M. HAIRSTON; AND B. J. AUSTIN	)	

ORDER

Pending before the Court is the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment in the above-styled cause of action. After consideration of the motion and the response and the replies thereto, the Court finds that the motion is well taken in part and not well taken in part.

I. BACKGROUND

The plaintiff Doyle V. Tatum brings this civil rights cause of actin pursuant to 42 U.S.C. § 1983 and alleges that he was unlawfully arrested, that he was the victim of excessive force, and that he was denied medical attention.

On March 4, 1982, Loyce Gates, an Animal Control Officer with the City of Texarkana, issued a courtesy warning notice to Tatum for

alleged violations of the City's animal control ordinances. Specifically, the notice cited Tatum for failure to obtain a license for his dog and for failure to confine the dog to its owner's premises. The notice purports to be signed by Tatum; however, Tatum denies that he had any contact with the Animal Control Officer in 1982. Tatum further denies that he owned a dog in 1982.

On August 9, 1982, Officer Gates filed an offense report stating that she had made repeated attempts to contact Tatum to inform him of his continuing failure to comply with the violations outlined in the courtesy warning notice. Officer Gates also filed a sworn criminal complaint, and on September 10, 1982, Municipal Judge Audrey Poulos issued a warrant for Tatum's arrest for failure to have a current dog license tag, a Class C misdemeanor.

Almost eight years later, on May 1, 1990 around 9:00 p.m., Officer Dwayne Lorance, A City of Texarkana police officer and not a party to this lawsuit, visited Tatum's home in connection

with his duty of serving old misdemeanor warrants. Lorance advised Tatum of the outstanding charge and informed Tatum that he could visit the warrant officer within the next few days in order to resolve the matter. Lorance went off duty at 10:00 p.m.

At approximately 10:15 p.m. that same night, Tatum phoned the Texarkana Police Department and asked to speak to Lorance in order to "get that thing ironed out that night because [he] found out that [he] didn't have a dog and [he] didn't even live there [when the arrest warrant was procured in 1982]." At 10:27 p.., Officer Austin was dispatched to Tatum's residence. Officer Hairston heard the radio dispatch and arrived at Tatum's residence first to serve as Austin's backup. Hairston radioed the station to confirm the warrant. Tatum asked Hairston if he could appear the next day to speak with the warrant officer as agreed upon with Lorance. Hairston informed Tatum that he would have to make an arrest because he had confirmed the warrant.

Austin then arrived and assumed control as the arresting officer.

Hairston frisked Tatum, and Austin applied handcuffs. Prior to being handcuffed, Tatum informed the officers that he had prior neck or back surgery. Austin testified that Tatum sat himself in the police car without any physical contact by her or Officer Hairston. However, Tatum claims that as he began to seat himself in the vehicle, he experienced difficulty with his arms moving into the small of his back and indicated to Austin that "this is not going to work." Tatum alleges that Austin then stated that she had procedures to follow and put her hand on his head and shoved him into the vehicle. Tatum alleges that Austin's action caused him "severe and debilitating injuries."

Tatum further alleges that Austin denied him medical treatment for his injuries. He claims that during the drive to the police station, he requested Austin to release his left arm from the handcuffs three times because of "the

excruciating pain he was suffering in his upper spine and left arm." Austin contends that Tatum complained once but did not request medical attention. Tatum admits that he never specifically requested medical attention.

Tatum was booked and released on bond at 11:23 p.m. Thereafter, he went to the emergency room at Wadley Medical Hospital in Texarkana where he was examined and released. The next day he was examined by Dr. Warren Long, the neurosurgeon who had performed his prior surgery. In December 1991, Tatum underwent additional surgery.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact an that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must

demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the motion is made and properly supported, an adverse party may not rest on allegations or denials but must set forth specific and supported material facts. Fed. R. Civ. P. 56(e). Therefore, the nonmovant must bring forth significant probative evidence to prevent summary judgment. Union Planters Nat'l Leasing Inc. v. Woods, 687 F.2d 117 (5th Cir. 1982). To that end, the Court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists, and is not required to resolve those disputes. Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). The fact that it appears to the Court that the nonmovant is unlikely to prevail at

trial or that the movant's statement of facts appears more plausible is not a valid reason to grant summary judgment. Id. at 283.

III. DISCUSSION

The defendants, Austin and Hairston, seek summary judgment of each of Tatum's claims on the ground that they are protected from suit and liability by qualified immunity. Tatum counters that there are genuine issues of material fact which preclude summary judgment.

A. Qualified Immunity

As police officers, Austin and Hairston are immune from both suit and liability unless it is shown that, at the time of the incident, they violated clearly established constitutional rights. Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992). The Court must follow the analytical structure set forth in Siegert v. Gilley, 111 S. Ct. 1789 (1991), when resolving a claim for immunity. The Court must first determine whether the plaintiff has "allege[d] the violation of a clearly established

constitutional right." Id. at 1783. If he had, then the Court must decide if the defendant's conduct was objectively reasonable. A finding of objective reasonableness entitles the defendant to qualified immunity regardless of whether a clearly established constitutional right of the plaintiff was violated. The reasonableness of the defendants' conduct is "assessed in light of the legal rules clearly established at the time" of the incident in question. Salas, 980 F.2d at 310. Of course, if there are triable issues of fact about whether an officer could reasonably believe his conduct was legal, then a jury should evaluate the question. White v. Walker, 950 F.2d 972, 976 (5th Cir. 1991).

The defendants do not contest that the plaintiff's claims allege the violation of clearly established constitutional rights. Furthermore, the Court finds that each of the claims allege the violation of clearly established law. Therefore, the Court will address only the second Siegert inquiry below.

B. Unlawful Arrest Claim

The defendants seek summary judgment of Tatum's unlawful arrest claim on the ground that there was probable cause for the arrest warrant, and, therefore, the arrest was lawful. In response, Tatum concedes that the City of Texarkana, Texas, is the "primary defendant to the unlawful arrest claim."[1] In fact, Tatum fails to address the unlawful arrest claim as it applies to Officers Austin and Hairston. It is undisputed that the officers confirmed the existence of the warrant via radio. It is further undisputed that the officers had no involvement in procuring the warrant.

Viewing the record in the light most favorable to Tatum and considering Tatum's failure to address the unlawful arrest claim as

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[1] Contemporaneously with the entering of this Order, the Court has entered an Order denying the Plaintiff's Motion for Summary Judgment on the issue of probable cause and determining that there are genuine issues of material fact for a jury to decide regarding the factual bases underlying the issuance of the warrant.

it applies to the officers, the Court concludes that there is no genuine issue as to any material fact and that summary judgment is appropriate with regard to Tatum's claims of unlawful arrest against Officers Austin and Hairston.

C. Excessive Force Claim

Defendant Officer Austin seeks summary judgment of Tatum's excessive force claim on the ground that she is entitled to qualified immunity. Tatum does not appear to assert an excessive force claim against Officer Hairston.

The Fourth Amendment, with its standard of reasonableness, governs claims of excessive force during arrest. Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870 (1989); Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993). In the Fifth Circuit, in order to state a claim for excessive force in violation of the constitution, a plaintiff must allege "(1) a[n]...injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively

unreasonable." Spann, 987 F.2d at 1115 (quoting Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc)).

The standard of objective reasonableness is "not capable of precise definition or mechanical application." Spann, 987 F.2d at 1115. In order to determine whether the officers' conduct was objectively reasonable in light of clearly established law at the time,[2] the Court must closely examine the facts and circumstances of each case, "including the severity of the crime at issue, whether the suspect p[oses an immediate threat to the officers or others, and whether he is actively resisting arrest or attempting to evade by flight." Graham, 490 U.S. at 396, 109 S. Ct. at 1872.

Tatum alleges that Officer Austin inflicted "severe and debilitating injuries" on him during

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[2] The arrest occurred in May 1990. Therefore, Johnson v. Morel, quoted *supra*, governs the standard for excessive force in the course of arrest.

his arrest for a misdemeanor failure to secure a dog license. It is undisputed that Tatum's behavior during the arrest was completely non-violent and peaceful. Nor is it disputed that Tatum informed the officers of his neck and back problems.

Both Hairston and Austin testified in their depositions that under the facts and circumstances of the night of May 1, 1990, there was no need to use any degree of force to secure Tatum's arrest. Hairston and Austin further testified that the use of any force in Tatum's situation would have been contrary to City of Texarkana police policies and procedures.

On this record, considering the facts in the light most favorable to Tatum, the Court cannot conclude that Officer Austin's actions were objectively reasonable. Accordingly, summary judgment is inappropriate with regard to Tatum's excessive force claim against Officer Austin.

D. Denial of Medical Attention Claim

Defendants also seek summary judgment of the plaintiff's claim of denial of medical attention.

Under the Eighth Amendment and the due process clause of the Fourteenth Amendment, "pretrial detainees are entitled to reasonable medical care unless the failure to supply the medical care is reasonably related to a legitimate governmental objective." Pedraza v. Meyer, 919 F.2d 317, 318 (5th Cir. 1990) (quoting Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987)). The Fifth Circuit has held that "prison officials have a duty, at a minimum, not to be 'deliberately indifferent' to a prisoner's serious medical condition." Id. at 318.

As discussed above, it is undisputed that both Officer Austin and Hairston were told by Tatum that he suffered from a neck and back condition. Tatum claims that he indicated to Officer Austin that it was painful for him to sit with his hands cuffed behind him. Tatum also claims that he told Austin that he was suffering "tremendous pain" in his left arm and that he

asked her three times to release his left arm. Tatum asserts that Austin ignored his complaints. Austin, however, contends that Tatum's only indication to her that he might be having physical difficulty during the drive to the station was his statement that he was "uncomfortable."

Considering the facts in the light most favorable to Tatum, the Court is unable to conclude that there is not a genuine issue of material fact as to whether Officer Austin's conduct demonstrated deliberate indifference to his medical condition. Accordingly, summary judgment with regard to this claim is inappropriate.

E. State Law Claim

Finally, the defendants seek summary judgment of the plaintiff's state law claims of negligence against them. The Court notes that Tatum has wholly failed to respond to the motion as it relates to the state law negligence claim. As discussed in Section II above, Fed. R. Civ. P.

56 and the relevant case law require the nonmovant to bring forth significant probative evidence to prevent summary judgment. After reviewing the record, the Court concludes that there are no genuine issues of material fact with regard to the plaintiff's state law negligence claim against Officers Austin and Hairston. Accordingly, summary judgment is appropriate with regard to that claim.

IT IS THEREFORE ORDERED that the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment is hereby GRANTED as to the plaintiff's unlawful arrest claim and state law negligence claim.

IT IS FURTHER ORDERED that the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment is hereby DENIED as to the plaintiff's excessive force claim and denial of medical attention claim.

SIGNED this 22nd day of September, 1993.

SAM B. HALL, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5370

DOYLE V. TATUM,

Plaintiff-Appellee,

V.

CITY OF TEXARKANA, ET AL.,

Defendants,

M. HAIRSTON and B.J. AUSTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(March 3, 1995)

Before WISDOM, KING, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

Carolyn Dineen King
United States Circuit Judge